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## Problems of Differentiation and Discrimination in Legal Regulation of Socially – Securing Relations

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### Introduction

According to article 6 of the Russian Federation Constitution every citizen of the Russian Federation in its territory possesses all rights and freedoms and performs equal duties provided by the Constitution. The state guarantees equality of the rights and freedoms of the person and the citizen irrespective of sex, race, nationality, language, origin, property and official position, residence, attitude to religion, belief, membership of public associations, and other circumstances as well.

Provisions of the Constitution of the Russian Federation on equality of the rights and prohibition of discrimination are also applicable to social security sphere when it concerns legal regulation of obligatory social insurance, pension provision, benefits provision, state assignment of social aid to needy citizens. However, statement of principle of discrimination prohibition as the constitutional one does not mean absence of objective necessity for differentiation of legal regulation of the

conditions defining the right to various kinds of social security depending on various factors. In this sense the differentiation acts as a discrimination antipode. Unfortunately, the Russian legislator does not always manage to implement a principle of equality and differentiation of legal regulation of socially-securing relations without infringement of discrimination prohibition. In this connection there is a necessity to research the named phenomena with reference to one of the most disputed spheres of public relations where financial interests of the state encounter citizens' constitutional rights to social security.

### Grounds for differentiation of legal regulation of socially-securing relations

In the Russian legislation on social security differentiation and its grounds (criteria) are not secured as initial provisions of legal regulation. Only the analysis of rules of law allows to draw a conclusion that the principle of the differentiated

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regulation of the conditions defining the right to various kinds of social security is one of the branch principles of social security law of Russia.

Its presence is explained by a number of circumstances which the lawmaking body takes into account while working out and passing so-called special norms i.e. rules concerning features of assigning various kinds of social security in the society. In this sense differentiation is not a discrimination demonstration but any distinction in the rules of law content, depending on legally significant bases which have value for legal relations subjects.

Among circumstances lying in the basis of differentiation of legal regulation socially-securing relations, the legislator singles out the following: sex, age, family or a property status, health state, working conditions, residence, etc. Differentiation in legal regulation of social security is also revealed with regard for physiological features of a female organism, its maternal function. Along with it a social role of parents in education of juvenile children is also taken into account. Grounds for differentiation secured in legislation generate, in turn, presence in many institutions of social security law special norms connected with occurrence of the right to a certain kind of social security, order and duration of its assigning, determination of the pension scale if it is a monetary payments matter.

The most numerous grounds for differentiation of legal regulation are contained in the institutions devoted to pension provision of citizens. Such a criterion of differentiation as industrial, i.e. work in adverse working conditions (set of harmful, heavy, hazardous to health and working capacity of the citizen factors of industrial environment) with regard for which the pension age decreases in assigning preterm labour old-age pensions has received a wide dissemination in this area.

In addition, an independent criterion in pension provision differentiation is such a socially significant circumstance as district in which labour activity (territorial criterion) took place. Legislation singles out a special group of preterm old-age pensions to persons working in regions of the Far North and districts, equal to them. Differentiation consists in decrease in generally established border of a pension age for men and women, special requirements for duration of the insurance experience in northern areas, raised pension scale.

In pensions provision on disability, criteria differentiation are connected with degree of disability (it conveys a degree of organism functions disorder and vital activity restriction of the person), and which social group a person recognised disable belongs to. It can be, for example, a participant of the Great Patriotic War, a military man who has received a military trauma, or citizen suffered in connection with the Chernobyl nuclear power plant breakdown. In this case differentiation is calculated depending on level of social security of the pensioner, or depending on special services to the state and society and is expressed in establishment of different rules determining the disability pension scale.

In a pensions provision of family members lost the bread-winner there is also differentiation of pension provision conditions such as pension provision of children – orphans or getting vocational training by children of the diseased bread-winner. Differentiation of legal regulation concerns provision with pensions for long service of civil employees and military men. It concerns, first of all, conditions of assigning long-service pensions and rules of pension scale determination.

Thus, at differentiation of legal regulation of pension relations legislation proceeds from two basic provisions: 1) connection of norms of

pension provision with the character of socially useful activity and 2) necessity of calculating features and requirements of the secured themselves in these norms.

At the same time it would be desirable to ascertain, that differentiation of legal regulation cannot be considered separately from that model of a social and economic policy which has developed in the state, its priorities and purposes. So, today the concept according to which the state creates necessary conditions for the normal work of citizens allowing them to provide a worthy standard of living independently prevails. The result of such an approach is reduction of so-called «labour poverty». It is impossible to say, that a similar concept is absolutely accepted by the Russian state, however some modern legislative decisions in Russia have been made with regard for necessity to provide a worthy standard of living first of all to working citizens covered by the obligatory social insurance system.

With reference to the area of social security it means dependence of the right to some kinds of pensions and benefits, rules of definition of their pension scale on the fact whether a citizen is insured or not, and what duration of the period of insurance is. For example, the right to labour pensions is stipulated by the fact of obligatory pension insurance and duration of the insurance experience, and their pension scale is connected with pension capital acquisition by the insured person. In the field of provision with benefits it is possible to find the same bases of conditions differentiation of their assigning and pension scale determination. So, temporary disablement allowance is paid to insured persons (the majority of them – working under the employment contract), and their pension scale with eight-year insurance experience accounts for 100 percent of average earnings<sup>1</sup>. As another example it is possible to mention a parental benefit for a child under 1,5 which amount concerning the insured

persons though is limited, but, by the general rule is determined in percentage terms to their earnings<sup>2</sup>.

Thus, criteria of social security differentiation depending on the fact of insurance of the person are of great importance nowadays.

However, to proceed with conditionality of the grounds for legal regulation differentiation in the field of social security by the purposes and priorities of modern social policy, we believe, that stipulating dependence of some payments on the insurance fact in legislation is unjustified. An example is the lump sum allowance for women registered in medical institutions in early terms of pregnancy, which purpose is to stimulate early terms pregnant women addressing to medical institutions and as a result assisting preservation of these women's health and a birth of healthy children. The given kind of allowance is paid in addition to a maternity and birth benefit. In other words, first of all insured women, i.e. women working under an employment contract can be covered by it. However, it is necessary to recognise that mother's and child's health should interest the state without dependence on the fact whether a woman is referred to the category of insured persons or not. Measures of material character in the form of benefits supporting so-called «responsible motherhood» should be aimed at all women, decided to give birth to a child. Along with it, it is necessary to think of a material interest of future mums. The amount of a specified allowance accounts for 300 roubles (article 10 of the Federal law May, 19th, 1995). And even its increase to 412, 08 roubles in connection with indexation this year cannot be considered as an effective measure of stimulation women to think as more seriously about own health and health of the future child as possible.

Another example concerns monetary payments to families having children. Citizens of the Russian Federation gone abroad for good

lose the right to allowances in connection with motherhood and the childhood. In the context of the current legislation it is considered logical. At the same time citizens of the Russian Federation irrespective of their residence are entitled to additional measures of the state support of families with children i.e. reception of the parent (family) capital (article 3 of the Federal Law December, 29th, 2006 «On additional measures of the state support of the families having children»)<sup>3</sup>. Inconsistency and discrepancy of the approach of the legislator to differentiation of legal regulation of the state support of the citizens having children is obvious. So, even a brief analysis of the modern condition of the state system of social security shows that differentiation is objectively necessary with a view of leveling a financial position of various groups of citizens and preservation (or restoration) their status as high-grade members of a society. Legislative activity on establishment of facts having legal value for provision of various categories of the population performs a very important function which essence is expressed in the reasonable, fair and meeting all the present requirements differentiation of conditions of provisions with certain kinds. Reflexion of the grounds for differentiation in a legal matter is always an urgent problem. In this connection R. Iering's expression comes to mind that law being placed among chaotic movement of human desires, aspirations, interests should constantly be finding an appropriate way by touch and having found it destroy obstacles blocking it<sup>4</sup>.

#### **On discrimination of socially-securing relations in legal regulation**

As recent-year legislative practice shows incorrect placement of some circumstances in an overall picture of legal regulation of socially-securing relations leads to strategic errors demanding their correction in the future.

Evidence to it are the Constitutional Court of the Russian Federation acts proclaiming prohibition to introduce such distinctions in pension and other rights of persons which have no objective and reasonable justification, in other words, have discriminative nature<sup>5</sup>.

We define discrimination as deformation of socially-securing legal relations subjects' equality or equality of their legal status by change of interrelations of the rights and duties, their security, volume and implementation spheres.

According to external expression nature, passive forms of discrimination<sup>6</sup> which are expressed in reluctance of law-enforcing bodies to accept measures on leveling legal statuses, coordination rights and duties, working out measures of provisions, elimination of infringements of equality and parity are typical to the social security law, in our opinion. For example, refusal of a temporary disablement allowance to the insured person under such a sign, as absence of the Russian citizenship. In the law making sphere discrimination demonstration is connected, first of all, with unwillingness (motivated or not) of legislative and executive bodies to carry out their activity according to strict conformity with social requirements. Their aspiration to satisfy narrow group interests (for example, civil servants), interests of a concrete region (especially concerning obligatory medical insurance), wrongly accepted benchmarks in the field of social policy lead to such interference of law in human life which public consciousness perceives as subjectively motivated and mismatching equality and justice parameters. If such a criterion as reasons and motives of justification of this or that decision of the state to be put into a basis of kinds of discrimination separation it is possible to speak about a so-called rational form of discrimination which is based on historically developed experience of differentiation of legal regulation of this or that

kind of professional activity. In our opinion, demonstration of rational discrimination is observed in the sphere of a pension provision of civil servants. So, the system of the state pension provision of federal civil servants at the expense of the federal budget means considerable growth of the pension scale of the specified categories of persons in comparison with labour (insurance) pensions has become subject to criticism. According to professor M.L.Zakharov, the substitution factor of such pensioners reaches 80 %<sup>7</sup>. It should be added, that calculation of pensions of federal civil servants is made on the basis of actual earnings; indexation of such pensions is performed on more favourable conditions than indexation of labour (insurance) pensions; and implementation of article 7 of the Russian Federation FL on December, 15th, 2001 provision<sup>8</sup> «On the state provision with pensions in the Russian Federation» on possibility of provision civil servants of the Russian Federation entities and municipal employees with pensions at the corresponding budgets expense means (by means of laws and other normative legal acts of the Russian Federation entities and local governments acts) aggravates the estimation of the current situation due to the discrimination provisions connected with official position of a certain category of persons in legislation.

There is also another example where professional activity has served as an excuse for discrimination positions in pension provision establishment. However, they concern not the addressee of monetary payment but his family members. It is the essence of the RF FL on July, 31st, 1998 (issued on July 24, 2009)<sup>9</sup> «On material provision of family members of the diseased member of the Council of Federation or the deputy of the State Duma of Federal Meeting of the Russian Federation». It provides that in case of a member of the Federation Council or the deputy of the State Duma of Federal Meeting of the

Russian Federation death each family member is provided with a monthly allowance accounted for 165 percent of the social pension scale provided by subpoint of item 1 of article 18 of the RF FL «On the state provision with pensions in the Russian Federation» with regard for its indexation at date of death according to the RF legislation. Certainly, payment provided by this law will take place along with labour pension in the event of a bread-winner's loss. Thus, the higher level of material security of family members differing from a standard one in such cases is derivative of the special status of the diseased stipulated in the first instance by his professional activity.

In modern socially-securing legislation it is possible to separate out the discrimination norms unreasonably differentiating rules of provision citizens with pensions depending on a territory of residence. As is known, the RF FL on December, 17th, 2001<sup>10</sup> « On labour pensions in the Russian Federation» provides increase in the fixed base scale of an insurance part of the labour old-age pension, the fixed base scale of labour disability pensions and in the event of a bread-winner's loss of those living in regions of the Far North and districts equal to them on regional factor during all period of residing in these areas (districts). However, it should be noted, that legislation singles out the third group of areas of Siberia and the Far East which are not referred to regions of the Far North and the districts equal to them, but, nevertheless, differ to a certain degree by extremeness of residing in them<sup>11</sup>. In these regions regional factors to wages which calculation is similar to those operating in northern territories are also established, namely: to compensate heavy climatic conditions to citizens working and living in there. However, this group of areas is not covered by the legislation on labour pensions, and as result, the increase in the fixed base scale of corresponding kinds of pensions in them is not made. It should be noted by the way,

that article 14 of the Russian Federation FL «On the state provision with pensions in the Russian Federation», providing possibility of increase in the pension scales for federal civil servants on the corresponding regional factor as well, singles out not only regions of the Far North and districts equal to them but one more group of areas – areas with heavy climatic conditions. In other words, here all three groups of areas (districts) are mentioned where decisions of the Government of the Russian Federation (or the former USSR) establish regional factors to wages.

We believe separation of discrimination norms concerning realization time into so-called potential, i.e. implemented within certain circumstances in the future is urgent. We will give an example of a similar form of discrimination in our opinion.

The state assumes to encourage later retirement on a pension without directive increase in a pension age. Since 2015 at assigning the labour old-age pension the fixed base amount of an insurance part of pension will go up 6 % for every insurance experience year exceeding 30 years for men and 25 years for women (item 17 of article 14 of the Law on labour pensions). In that case the pension scale will be more. On the other hand, the fixed base amount of an insurance part of the labour old-age pension established to citizens with regard for insurance experience less than 30 years for men and 25 years for women (except for the citizens having the right to prescheduled assignment of the labour old-age pension) will decrease 3 % for each full year less than 30 years for men and 25 years for women accordingly (item 18 of article 14 of the Law on labour pensions). Thus, the offered percent system for each additional year over 25 or 30 years of the insurance experience will economically stimulate a person to later retirement. And on the contrary if experience is less than 25 or 30

years the assigned pension scale will be less. The given system will be introduced since 2015 for citizens to get prepared for it and make a decision on their labour activity or retirement with regard for the set forth rules.

As a result of such innovation persons with higher education will appear in obviously unprofitable position as neither old, nor new edition of the Law on labour pensions do not provide inclusion of training in high school, postgraduate study, internship's periods into the insurance experience. So, discrimination is revealed in such a definition of a circle of legally significant circumstances which leads to imperfection of the legal form: it becomes far from justice, and it, in turn, results in low efficiency of legal regulation, does not affect a society life positively. In effect, value of law as a regulator of public relations is being washed away.

### Conclusion

Differentiation is a system of the factors based on objectively existing steady features of working conditions and subjects of corresponding relations. However, domestic experience shows that differentiation of legal regulation of socially-securing relations sometimes turns into its contrast – discrimination.

The modern period of time makes jurisprudence face complicated issues connected with implementation of a principle of equality in socially-securing relations which demand a deep reasoning and corresponding legal forms of response. The choice of objectively significant circumstances with which the legislator connects certain legal consequences is urgent. Russian lawyer G.D.Gurvich called them «normative facts» and emphasised that they find their reasoning in the fact of the existence, as a similar fact itself is a positive legal value and serves implementation of justice<sup>12</sup>. Legally significant circumstances connect law with life and allow to

respond to public relations changes. Their inexact separation and wrong legal estimation lead to the situation where some circumstances are not given due value, while others, on the contrary, get qualities unusual for them and result in discrimination in legal regulation.

- <sup>1</sup> On providing temporary disablement allowances, on pregnancy and childbirth of the citizens who are subject to obligatory social insurance: the Federal law of Russian Federation December, 20th, 2006 under edit.. February, 09th, 2009//Inquiry legal system «ConsultantPlus»
- <sup>2</sup> On welfare payments to the citizens having children: the Federal law of Russian Federation May, 19th, 1995 under edit.. December, 25th, 2008//Inquiry legal system .»ConsultantPlus»
- <sup>3</sup> ILS «Consultant plus»
- <sup>4</sup> R. Iering. History of philosophy and law. Under edit. of Kerimov D.A.. – SPb. St. Petersburg University MIA., Russia, 1998. P. 43.
- <sup>5</sup> See, e.g.: the Decision of the Constitutional Court of the Russian Federation June, 3rd, 2004 № 11-P «On case on inspection of constitutionality of subparagraphs provisions 10, 11 and 12 points 1 of article 28, points 1 and 2 articles 31 of the Federal law» On labour pensions in the Russian Federation «in connection with inquiries of the State Duma of the Astrakhan area, the Supreme court of the Udmurt Republic, the Birobidzhan city court of the Jewish autonomous region, Yelets city court of Lipetsk area, left-bank October and Soviet regional courts of a city of Lipetsk, and also complaints of some citizens»; Decision of the Constitutional Court of the Russian Federation June, 27th, 2005 № 231 «Under the complaint of citizen Galeyev Kaspaja Amambaevicha about infringement of his constitutional rights by subparagraph provision 1 of point 1 of article 28 of the Federal law» On labour pensions in the Russian Federation «; Decision of the Constitutional Court of the Russian Federation November, 2nd, 2006 № 492 «On demand of the Soviet regional court of a city of Ryazan on inspection of constitutionality of positions of subparagraph 2 of point 1 of article 6, point 1 of article 7, the paragraph of fourth point 1 of article 11 and point 2 of article 14 of the Federal law «On obligatory pension insurance in the Russian Federation «//ILS «ConsultantPlus»
- <sup>6</sup> Active forms of discrimination differ from passive forms on degree of intensity of external display and character of the come consequences. It can be discriminatory checks of documents, motor transport, search of physical persons.
- <sup>7</sup> Zakharov M.L. Basic principles of labour (insurance) pension scale determination: reality and perspectives // «Russian law journal». 2009. № 7. ILS «ConsultantPlus».
- <sup>8</sup> ILS «ConsultantPlus»
- <sup>9</sup> ILS «ConsultantPlus»
- <sup>10</sup> ILS «ConsultantPlus»
- <sup>11</sup> See art. 14 of the Law of the Russian Federation on February, 19th, 1993 (in edit. July, 24th, 2009) «On the state guarantees and indemnifications for the persons both working and living in regions of the Far North and districts equal to them» and the Decision of the Supreme Council of the Russian Federation on February, 19th, 1993 «On putting into effect order of the Law of the Russian Federation «On the state guarantees and indemnifications for the persons both working and living in regions of the Far North and districts equal to them «//ILS ConsultantPlus».
- <sup>12</sup> Gurvich G.D. Idea of social law- Philosophy and sociology of law: Selected works / Tran. M. V. Antonova, L.V. Voronina – SPb. , 2004. P. 159.

## **Проблемы дифференциации и дискриминации в правовом регулировании социально-обеспечительных отношений**

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*В статье исследуются проблемы дифференциации и дискриминации в правовом регулировании социально-обеспечительных отношений.*

*Ключевые слова: правовое регулирование социально-обеспечительных отношений, дифференциация правового регулирования социально-обеспечительных отношений.*

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